

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,
Plaintiff,

v.

Aurelio Flores-Soriano,
Defendant.

No. CR-13-00698-TUC-JGZ

ORDER

Pending before the Court is Defendant Flores-Soriano's Objections to Presentence Report and Sentence Memorandum (Doc. 20), in which he objects to a proposed twelve (12) level sentencing enhancement for a prior "drug trafficking offense" pursuant to U.S.S.G. § 2L1.2(b)(1)(B) for his 2010 conviction for Possession of a Controlled Substance for Sale in violation of California Health & Safety Code § 11351. (PSR ¶¶ 10, 21). Defendant asserts § 11351 fails the "divisibility" requirement recently articulated in *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and is therefore not subject to a modified categorical analysis pursuant to *Taylor v. U.S.*, 495 U.S. 575, 598 (1990). The Defendant further objects claiming the Government has failed to produce judicially noticeable documents. For the reasons discussed herein, the Court finds that §11351 is a divisible statute subject to the modified categorical approach and that the Government has produced judicially noticeable documents sufficient to support the sentencing enhancement.

I. Legal Framework

Under U.S.S.G. § 2L1.2(b)(1)(B), a twelve (12) level sentencing enhancement applies

1 if a defendant was previously deported after a felony conviction for a “drug trafficking
 2 offense” for which the sentence imposed was 13 months or less, and the conviction
 3 received criminal history points. *See* § 2L1.2(b)(1)(B). “Drug trafficking offense” is
 4 defined in Application Note 1(B)(iv) as a law that “prohibits the manufacture, import,
 5 export, distribution, or dispensing of, or offer to sell a controlled substance ... or the
 6 possession of a controlled substance ... with intent to manufacture, import, export,
 7 distribute or dispense.” *Id.* The term “controlled substance” as used in this definition
 8 means “those substances listed in the [Controlled Substances Act].” *United States v.*
 9 *Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012). Defendant Flores-Soriano’s predicate
 10 offense criminalizes:

11 [p]ossess[ion] for sale or purchases for purposes of sale (1)
 12 any controlled substance specified in subdivision (b), (c), or
 13 (e) of Section 11054, specified in paragraph (14), (15), or (20)
 14 of subdivision (d) of Section 11054, or specified in
 15 subdivision (b) or (c) of Section 11055, or specified in
 16 subdivision (h) of Section 11056, or (2) any controlled
 substance classified in Schedule III, IV, or V which is a
 narcotic drug.

17 § 11351.¹

18 The Ninth Circuit has held that § 11351 is not categorically a “drug trafficking
 19 offense” because § 11351 criminalizes possession or purchase of certain substances that
 20 are not covered under the Controlled Substances Act. *Leal-Vega*, 680 F.3d at 1167. As
 21 such, the issue before this Court is whether § 11351 is “divisible” and subject to the
 22 modified categorical approach in light of the Supreme Court’s recent ruling in *Descamps*,
 23 133 S.Ct. 2276.

24
 25 ¹ Although Defendant’s predicate offense is for “POSSESSION FOR SALE OF A
 26 CONTROLLED SUBSTANCE,” which is not a specifically enumerated factor, this
 27 Court finds that it falls within the distribution definition. *See, e.g., United States v.*
 28 *Martinez-Rodriguez*, 472 F.3d 1087, 1096 (9th Cir. 2007) (noting “California’s
 possession for sale closely mirrors the federal statute that criminalizes possession with
 intent to distribute.”)

1 **II. Section 11351 is Divisible Under *Descamps***

2 In *Descamps*, the Supreme Court held that the modified categorical approach serves
 3 only the “limited function” of supplementing the categorical analysis “when a divisible
 4 statute, listing potential offense elements in the alternative, renders opaque which
 5 element played a part in the defendant's conviction.” *Id.* A statute is “divisible” when it
 6 is comprised of “multiple, alternative versions of the crime.” *Id.* at 2284. By
 7 comparison, an “indivisible” or “non-divisible” statute “has a single, indivisible set of
 8 elements” and does not contain “alternative elements,” and may criminalize “a broader
 9 swath of conduct.” *Id.* As such, the modified approach “has no role to play” if the prior
 10 conviction is predicated on a nondivisible (or indivisible) statute, including statutes that
 11 are “missing elements” or whose elements are “overbroad” in way that they could cover
 12 both qualifying and non-qualifying conduct. *Id.*

13 However, “when a defendant [is] convicted of violating a divisible statute,” courts
 14 may employ the modified categorical approach “to determine which statutory phrase was
 15 the basis for the conviction.” *Id.* at 2285. The Supreme Court explained that in these
 16 limited circumstances, the modified approach acts as a “tool” or a “mechanism” for
 17 comparing when a statute lists multiple, alternative elements, and so effectively creates
 18 ‘several different ... crimes.’” *Id.* (citation omitted). Significantly, the Supreme Court
 19 explained that:

20
 21 [i]f at least one, but not all of those crimes matches the
 22 generic version, a court needs a way to find out which the
 23 defendant was convicted of. That is the job, as we have
 24 always understood it, of the modified approach: to identify,
 from among several alternatives, the crime of conviction so
 that the court can compare it to the generic offense.

25 *Id.* The Supreme Court further instructed that when courts conduct a modified
 26 categorical approach, courts should not consider the “facts” of the prior conviction but
 27 instead evaluate only the “elements” of the state crime to ensure they correspond with the
 28 generic offense. *See id.* at 2284.

1 In *Descamps*' wake, Defendant Flores-Soriano now argues that § 11351 is indivisible
 2 and that its list of controlled substances does not and cannot make it divisible. (Doc. 20,
 3 p 3, Ins. 3-10). Defendant argues that § 11351's controlled substance list merely
 4 identifies "facts" and not elements of the offense. (*Id.*) To support his position,
 5 Defendant asserts that *Descamps* considered Cal. Penal Code § 459's list of many
 6 "structures, vehicles, containers, and vessels" as "facts" not "elements. (Doc. 20, p. 3,
 7 Ins. 5-8, citing *Descamps*, 133 S.Ct. at 2290-91.) However, *Descamps* does not make
 8 this narrow holding; rather, *Descamps* held that sentencing courts may not apply the
 9 modified categorical approach to divisible statutes and then found that California's first
 10 degree burglary statute was indivisible *because* it was facially broader than the generic
 11 definition of burglary. *Id.* at 2282, 85, 93.

12 To read *Descamps* as suggested by Defendant, this Court would have to ignore the
 13 Supreme Court's principal "divisibility" decisions cited, with approval, in *Descamps*. *Id.*
 14 at 2284-85. For instance, the Supreme Court observed that in *Taylor* at U.S. 575 at 602,
 15 it recognized the modified approach's legitimate role in parsing a divisible burglary
 16 statute that had both "building" and "automobile" as alternate elements. *Id.* at 2284.
 17 Similarly, *Descamps* approvingly noted that in *Shepard v. United States*, 544 U.S. 13,
 18 125 S.Ct. 1254 (2005), it upheld the modified approach applied to a Massachusetts
 19 burglary statute covering entries into "boats and cars" as well as buildings. *Id.* at 2284
 20 (citation omitted). The Court similarly recognized that a Massachusetts "Breaking and
 21 Entering at Night" statute referred to "several different crimes" in *Nijhawan v. Holder*,
 22 557 U.S. 29, 129 S.Ct. 2294 (2009), because it had four alternative places: "building,
 23 ship, vessel, or vehicle." *Id.* (citations omitted). According to the Supreme Court,
 24 therefore, "boats, cars, buildings, and ships" can all constitute alternate "elements" of an
 25 offense. *Id.* Certainly, if a "ship" or a "vehicle" can be an alternate "element" as
 26 understood by the majority in *Descamps*, then "heroin" or "cocaine" can also be
 27 "elements" of § 11351.² This Court is not alone in this conclusion. *See United States v.*

28 ² Indeed, the Supreme Court cautioned sentencing courts not to "delve into the

1 *Ramirez-Macias*, CR-13-0059-JLQ, 2013 WL 4723453 (E.D. Wash. Sept. 3, 2013)
 2 (holding §11352's list of controlled substances created a divisible statute and applying
 3 the modified categorical approach); *see also United States v. Brooks*, 12-30002, 2013 WL
 4 3186577 (9th Cir. June 25, 2013) (unpublished opinion) ("Because the statute provided a
 5 finite list of definitions, the district court could 'determine which statutory phrase was the
 6 basis for the conviction.'"); *Cabantac v. Holder*, 2013 WL 4046052, n. 2 (9th Cir. Aug.
 7 9, 2013) (Murguia, M., dissenting) (although undecided, "[i]t appears that § 11377(a)
 8 (controlled substance offense) is a divisible statute that permits the application of the
 9 modified categorical approach.); *United States v. Gonzalez-Tejeda*, 12CR2967 WQH,
 10 2013 WL 4401381 (S.D. Cal. Aug. 15, 2013) (finding that Washington Revised Statute §
 11 69.50.401A, Possession of a Controlled Substance with Intent to Distribute, is a divisible
 12 statute as it enumerates five separate groups of controlled substances in the disjunctive).

13 Moreover, the plain language of §11351 contains a single subsection listing potential
 14 offenses utilizing the disjunctive "or." *See, e.g., United States v. Acosta-Chavez*, 12-
 15 10324, 2013 WL 4082128, n.5 (9th Cir. Aug. 14, 2013) (emphasizing the "divisibility"
 16 created by the statutory "or"); *see also Duenas-Alvarez v. Holder*, 04-74471, 2013 WL
 17 4417587 (9th Cir. Aug. 20, 2013) (finding California Vehicle Code § 10851(a) divisible
 18 in that it imposes criminal liability in the alternative on principals as well as on
 19 accessories after the fact); *c.f. United States v. Edwards*, 12-10204, 2013 WL 4105532
 20 (9th Cir. Aug. 15, 2013) (remanding for resentencing upon Government concession that
 21 Nevada's attempted burglary statute was not a divisible as it lacked a risk of physical
 22 injury element). The California Supreme Court has also explained that § 11352, a sister
 23 statute, has no "primary element" and that its list of over 100 different controlled
 24 substances was to prevent the legislature from having to enact hundreds of individual
 25 statutes. *See Ramirez-Macias*, 2013 WL 4723453 (citing *People v. Patterson*, 49 Cal.3d
 26 615, 262 Cal.Rptr. 195, 778 P.2d 549, 556 (1989)). Finally, a review of the California

27
 28 nuances" of "elements verses means" issue and emphasized that the focus should be on
 whether the state law is drafted in the alternative. *See id.* at n. 2.

1 model jury instructions for § 11351 reveals that a prosecutor must prove, as an element of
2 the crime, that a particular controlled substance was indeed the particular controlled
3 substance alleged in the offense and insert its name in the jury instructions to be proven
4 to the jury beyond a reasonable doubt. *See* CALCCRIM 2302. Such particularity is in
5 accord with the Supreme Court’s rationale in *Descamps* that divisible statutes “enable a
6 sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the
7 defendant of every element of the generic crime.” *Descamps*, 133 S.Ct. at 2283.
8 Consequently, this Court finds that § 11351 is divisible and subject to the modified
9 categorical approach.

10 **III. The Government has Produced Judicially Noticeable Documents**

11 Defendant Flores-Soriano further argues that the Government has failed to produce
12 judicially noticeable documents to support the sentencing enhancement because (1) the
13 submitted court docket “Computer Printout” is unreliable, (2) the submitted “Felony
14 Complaint” fails to establish that he pled guilty to “Count 1 of the Felony Complaint;”
15 and (3) the submitted “Felony Advisement of Rights, Waiver, and Plea Form” fails to
16 reference “heroin” or “Complaint” and therefore does not aid this Court in determining
17 which drug or what charging document was involved in the underlying conviction. (Doc.
18 20, pgs. 3-5).

19 In making these determinations, this Court looks to the “statutory definition, charging
20 document, written plea agreement, transcript of plea colloquy, and any explicit factual
21 finding by the trial judge to which the defendant assented.” *Shepard v. United States*,
22 544 U.S. 13, 20–21, 125 S.Ct. 1254 (2005). Moreover, where a defendant pleads guilty
23 to “a particular count of the criminal complaint or indictment, we can consider the facts
24 alleged in that count.” *See, e.g., Cabantac*, No. 09–71336, 2013 WL 4046052, at *5.

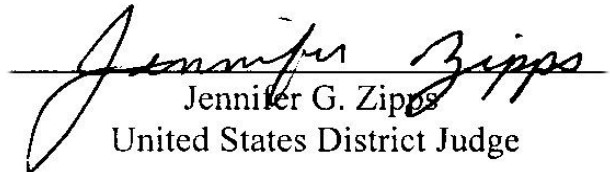
25 Here, although the Court disagrees with the Defendant’s assertions that it is “well
26 established” that a “Computer Printout” cannot be judicially noticeable document, this
27 Court need not decide the issue because it does not rely on the “Computer Printout” to
28 determine the sentencing enhancement. (Doc. 20, p. 4, lns 3-6.) Rather, the Government

1 has submitted a California Superior Court two-count "Felony Complaint," dated August
2 10, 2010, Case No. SA 075067, in which Count I alleges a violation of § 11351,
3 specifically stating "heroin" as the controlled substance at issue in the offense. The
4 Government also submitted a "Felony Advisement of Rights, Waiver, and Plea Form,"
5 again reflecting case number SA075067, in which Defendant Flores-Soriano agreed to
6 pled guilty (no contest) to Count I to a charge of "H&S 11351." While it is true, as
7 Defendant argues, that the plea agreement fails to identity the charging document to
8 which he pled guilty, it is evident from the documents that the Felony Complaint
9 contained a Count I charging a violation of §11351, and that, indeed, Defendant Flores-
10 Soriano pled guilty to that Count. Similarly, the Complaint adequately identifies the
11 controlled substance as "heroin." *See, e.g. Leal-Vega*, 680 F.3d at 1168 (finding an
12 abstract that clearly stated defendant pled guilty to possession of heroin was sufficient for
13 sentencing enhancement purposes).

14 Upon review, this Court finds that Defendant Flores-Soriano's 2010 conviction under
15 § 11351 for the Possession for Sale of a Controlled Substance (Heroin) meets the
16 definition of a "drug trafficking offense," as defined by the U.S. Sentencing Guidelines.

17 According, IT IS ORDERED that Defendant Flores-Soriano's Objections to the
18 Presentence Report (Doc. 20) are OVERRULED.

19 Dated this 16th day of September, 2013.

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23 Jennifer G. Zipps
24 United States District Judge
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